82-942

No.

In the Supreme Court of the United States

October Term, 1982

TERRANCE A. DeCRANE,

and

STANLEY N. RADISH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Claims

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QUESTIONS PRESENTED

(1) Whether the United States Court of Claims erred in deciding as a matter of law that plaintiffs received the training described in their contracts?

(2) Whether the Court of Claims erred in deciding as a matter of law that plaintiffs received everything they were validly promised under the enlistment agreements and have not stated a valid claim for breach of contract?

(3) Whether disputes involving breaches of enlistment contracts are subject to general principles of contract law and allow money damages to be awarded for such breaches?

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Petitioners, Terrance A. DeCrane and Stanley N. Radish, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Claims entered in the above entitled case on September 3, 1982.

OPINION BELOW

The Opinion as given in the Order of the United States Court of Claims is printed in Appendix hereto, *infra*, pp. A1-A5.

JURISDICTION

The Order of the Court of Claims (Appendix, *infra*, p. A1) was entered on September 3, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. §1255.

REGULATIONS INVOLVED

Army regulations (AR) 611-201 and 635-200. Pertinent portions of these regulations have been set forth in the Appendix, pp. A14 to A15.

STATEMENT OF FACTS

In 1977 plaintiffs, Terrance DeCrane and Stanley N. Radish enlisted in the United States Army to be trained and then serve as Clinical Specialists. This training and service was represented by the Army to be equivalent to the training and experience of a civilian licensed practical nurse.

Shortly after they began serving, plaintiffs discovered that the training and experience that they were actually receiving would in no way qualify them to apply for certification as licensed practical nurses. Plaintiffs attempted to cure the problem by requesting the Army to train them as they were entitled to be trained by contract. Defendant refused to provide such training.

Subsequently, plaintiffs sought immediate release from the Army, which when requested were denied for substantial periods of time before plaintiffs were discharged.

Plaintiffs filed this action in contract in the Court of Claims seeking damages for loss of past and future income, the value of training they would have received and the costs of all litigation resulting from the government's breaches.

Jurisdiction was based on the Tucker Act, 28 U.S.C. §1491.

The Court of Claims' Motion for Summary Judgment granted defendant's Motion for Summary Judgment and dismissed plaintiffs' Petition (See Appendix p. A1).

REASONS FOR GRANTING THE WRIT

I.

There are material facts in dispute and the Court of Claims erred in granting defendant's Motion for Summary Judgment.

The training promised plaintiffs was a material element of their contract and the primary inducement for plaintiffs to enter into said contract. Determining the meaning of "MOS 91 C10" training presents a genuine issue of material fact.

The Army promised plaintiffs training and experience which would have qualified them to apply for certification from their State's Nursing Board as licensed practical nurses.

A written contract (copy attached hereto, Appendix p. A6) was entered into between the defendant and plaintiff Terrance DeCrane on the 8th day of December, 1977, providing that said plaintiff would re-enlist in the Army of the United States for a term of four (4) years and be trained for and then serve in the Military Occupational Specialty (MOS 91 C10). It is not disputed that the written contract promised and guaranteed plaintiff technical school training known as MOS 91 C10 (See items 1a and 1b of Annex A, Appendix p. A9).

A similar enlistment contract with identical promises and guarantees was entered into by defendant and plaintiff

Stanley N. Radish on the 12th day of October, 1977 (Copy attached hereto Appendix p. A11).

Army Regulation 611-201 provides job descriptions for every existing position in the Army. Regulation 611-201 Chapter 6 contains the description of MOS 91 C10 and is entitled "Clinical Specialist" (See Appendix p. A14). It is not disputed that plaintiffs are privy to this publication by reason of regulations which incorporate such job descriptions into enlistment contracts.

Page two (2) of the MOS 91 C10 describes the qualifications to serve as a 91 C10. Under this regulation, the enlistee must go through "Mandatory Formal Training" *or* "possess current State or Commonwealth of Puerto Rico license as practical or vocational nurse" (See Appendix p. A15). On its face, this Army Regulation equates mandatory formal training to that of an individual who is trained and licensed as a practical nurse.

A review of the duties performed by a MOS 91 C10 (as contained in Appendix p. A14) reflects that the duties to be performed in this classification are in many instances duties that could only be performed by a licensed practical nurse (See affidavit of nurse attached hereto as Appendix p. A26).

Furthermore, page two (2) of MOS 91 C contains the classification of "nurse licensed, practical" as a "related civilian occupation" to that of MOS 91 C10. The word "related" in common usage is defined as "associated" or closely connected (See WEBSTER'S DICTIONARY). Yet, the training received by plaintiffs proved to be wholly inadequate in helping them to qualify for certification from their State Nursing Boards as licensed practical nurses.

Army recruiters were acting in the scope of their authority while explaining to plaintiffs the meaning of the MOS 91 C10 job description.

In addition to supplying plaintiffs with a written publication of Army Regulation 611-201 outlining the training and experience allegedly given to a 91 C10, the Army provided plaintiffs with personnel to explain the meaning of that "career opportunity". Enlisted Army personnel in the Military Occupational Specialty, OOE, otherwise known as recruiters, have duties which include counseling prospective enlistees, discussing training opportunities and explaining military/civilian educational opportunities (See Appendix p. A16). It cannot be seriously argued that recruiters were acting beyond the scope of their duties and without the authority provided to them by Army Regulation 611-201 when recruiters explained the meaning of MOS 91 C10 to plaintiffs. It is well settled law that the United States is bound by the representations of agents acting within the scope of their duties and authority.

II.

The regulations pertaining to alternatives available to plaintiffs in the event the government could not fulfill its commitment were misleading and unconstitutional. To uphold such regulations would perpetrate considerable injustice.

The Army contends that part II, item 4 of Annex A attached to plaintiff DeCrane's contract (See Appendix p. A9) and Section III 1f of Annex B attached to plaintiff Radish's contract (See Appendix p. A12) constitutes exclusive remedies for the Army's failure to fulfill its commitments. The Army also argues that plaintiffs received their remedy when they were discharged from service. The clauses in plaintiff's contracts read as follows:

> "In the event my enlistment cannot be fulfilled, the alternatives available to me will be as provided in Chapter 5, Army Regulation 635-200, *as of the date of my claim* of unfulfilled enlistment commitment . . ."

The regulations in Chapter 5, 635-200 applicable to plaintiff DeCrane's enlistment are those dated November 21, 1977 (See Appendix p. A19). Those applicable to plaintiff Radish are dated June 1, 1978 (See Appendix p. A23).

Stated simply, the above mentioned contract clause and Army Regulation 635-200 provided contract clause and Army Regulation 635-200 provided plaintiffs with the alternatives of staying in the Army or obtaining discharges as of the dates of their claims of unfulfilled enlistment commitments.

The Army does not dispute that plaintiff DeCrane made his claim for unfulfilled commitment on July 12, 1978 choosing the alternative of discharge. Plaintiff's request was denied on September 26, 1978. The Army did not honor plaintiff DeCrane's contractual right to discharge until January 23, 1979; this was more than six (6) months after the date of his claim. Similarly, plaintiff Radish was not awarded his remedy of discharge until nearly eight months after the date of his claim. In both cases, the Army initially denied plaintiffs' requests, but then realized its mistakes and released plaintiffs from service. Surely plaintiffs had rights to releases from the Army as of the dates of the Army's initial decisions. Thus, the Army breached its commitment to provide plaintiffs with speedy discharges.

Assuming arguendo that there was a legitimate public policy favoring national security which precluded plaintiffs from obtaining the remedies to which they had contractual rights, then there should be some remedy afforded plaintiffs to avoid considerable injustice. Plaintiffs DeCrane and Radish were twenty-one and twenty-five-years old respectively when they entered into the contracts which are the subject of this litigation. As a result of these

contracts, plaintiffs DeCrane and Radish expended over thirteen and sixteen months of their lives, respectively, serving the Army. In exchange for their time in service, plaintiffs gained training which was of little or no value in preparing them to apply for certification as licensed practical nurses. The remedy clause in plaintiffs' contracts was not enforced and did not make them whole. Neither plaintiffs nor reasonable individuals would enter into a contract knowing that their remedies would be so narrow and be so slow in coming. The remedy provided plaintiffs was unconscionable and inappropriate under the circumstances. Nevertheless, such questions of reasonableness and unconscionability are questions to be determined by the trier of fact and not properly decided in summary judgment proceedings.

III.

Current case law supports the plaintiffs' arguments.

In this era of a volunteer military establishment, military enlistment contracts are subject to modern principles of contract law. *Withum v. O'Connor*, 506 F. Supp. 1374 (U.S. D.C. Puerto Rico 1981); *Novak v. Rumsfeld*, 423 F. Supp. 971 (U.S. D.C. N.D. Cal. 1976); *Peavy v. Warner*, 493 F.2d 748 (5th Cir. 1974).

Above all other contracting parties, the government must be held to its promises. *Novak v. Rumsfeld, supra.*

There have been cases where courts have considered claims for money damages arising from alleged breaches of enlistment agreements, although in each case the court has found no breach. *Jackson v. United States*, 573 F.2d 1189 (Ct. Cl. 1978).

The United States is bound by agents acting within their authority and as provided by regulations. See generally, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947).

In *United States v. Larionoff*, 431 U.S. 864, 877 (1977), this Court recognized that regulations promulgated by the military may be ambiguous and mislead enlistees. In footnote 19, the Court stated as follows:

> "To the extent that such beliefs had been fostered upholding the regulations would perpetrate a considerable injustice."

Current law indicates that plaintiffs have stated causes of action upon which relief may be granted.

In summary, the government breached its obligations to train plaintiffs as described in their contracts. Provisions in the contract obligated the government to provide plaintiffs with alternatives to remedy the breaches. The government breached its obligations to adequately provide these alternatives. Thus, the government's breach of its training obligation has not been cured.

It is proper to have the above facts decided by the trier of fact. Plaintiffs have stated breach of contract causes of action upon which relief in the form of money damages may be granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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